IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 7343 OF 2002

Rajendra Murlidhar Tarate & ors.... Petitioner

versus

Sau. Sumanbai Baburao Vidhate & ors..... Respondent.

Shri R.S.Apte with M.V.Limaye for the petitioner.
Ms. V.S.Mhaispurkar i/b. Shvi Navin Chomal & Ms. Sonia Gujar for respondent no.1.

CORAM; A.P. DESHPANDE, J.
DATED; 19TH SEPTEMBER, 2007

P.C.;

1. Respondent no.1 herein is the original plaintiff who entered into an agreement with the respondent nos.2 and 3 for purchase of agricultural land admeasuring about four acres. The respondent nos. 2 and 3 are the parents of the present petitioners so also the respondent no.4. Acting on the agreement of sale, when the respondent nos.2 and 3 failed to execute the sale deed, the respondent no.1 filed a suit for specific performance of contract. The present petitioners and the respondent no.4 filed a suit for partition and separate possession of their share by claiming that the property concerned is an ancestral property. Holding in favour of the present

petitioners and respondent no.4, the trial court decreed the partition suit and granted 1/5th share each to the plaintiffs viz. the present petitioners and respondent no.4, and 1/5th share each in favour of the respondent nos.2 and 3. It is thus clear that all the members of the joint family were held to be entitled to 1/5th share. The suit for specific performance as well came to be decreed. However, as the properties were to be first partitioned, the court directed that after the properties are partitioned, a decree for specific performance shall be executed. It is undisputed that the property came to be partitioned. A final decree application no.2/95 came to be filed by respondent no.1. Both the suits came to be decreed on 14-8-1989. The final decree application was decided on 17-1-2000 and I am informed that the sale deed has been executed in favour of the respondent no.1 on 25-8-2000.

2. In the above factual background the present petitioners carried an appeal against the decision of the final decree application before the District Judge, and as there was delay in filing of the appeal, the petitioner filed an application for condonation of delay and the rejection of the said application has given rise to the filing of the present writ petition.

3. The petitioners tried to contend that when they had gone to the house of their parents on 2-5-2000 at Pimpalgaon, they learned about the decision of the final decree application. It was contended that they were not served with the summons in the final decree application. It is an admitted position that the relations of the present petitioners with the respondents are cordial and they are on visiting terms. Record also reveals that all through out the case before the court,was attended by the present respondent no.4 Ajit, who is brother of the present petitioners, for and on behalf of the petitioners and he was served with the summons and he has participated in the proceeding.

4. The only question that arose for consideration before the appellate court was as to whether the petitioners have shown sufficient cause for condoning the delay in filing of the appeal. On appreciation of evidence and material on record, a categorical finding has been reached that the present applicants were duly served with suit summons and as the very basis for seeking condonation of delay has been found to be non-existent, the application has been rejected. The present petitioners were served under Order 5 Rule 20 by substitute service and the notice was affixed on the conspicuous part at the address furnished by the

petitioners. The petitioner no.2 was served by affixing the notice at the residential house in the presence of his wife, whereas the petitioner no.1 was served by affixing notice in the telephone exchange office at Nashik. The petitioner no.1 was working in telephone exchange office situated at N.D.Patel road. The bailiff had been to the office of the petitioner no.1 on more than three occasions and bailiff's report prepared by different bailiff indicate that at the time of their visit, the petitioner no.1 was not available in the office either on account of he being on leave or having left the office. As the petitioner no.1 was avoiding service, an application was moved by the decree holder/respondent no.1 and the court passed an order directing substitute service by having recourse to Order 5 Rule 20. The petitioner no.1 tried to take advantage of the fact that the address mentioned in the summons, sought to be served by the bailiff on the respondent no.1, was telephone exchange office, Trimbak road and hence an attempt was made to contend that the bailiff did not visit the office of the petitioner no.1. Perusing the bailiff's report and after considering the evidence on record the District judge has found that the address of the telephone exchange office on the summons was wrongly stated to be Trimbak road, whereas the bailiff had infact gone to the office where the petitioner no.1 is

working. It appears that there is no such office at Trimbak road and the said wrong address has been relied upon by the present petitioners for raising a contention that petitioner no.1 was not duly served. Having held that the petitioners were duly served with the notices, the District Judge has proceeded to reject the application for condonation of delay.

5. Besides recording the categorical finding about the service of the notice on the petitioner, being duly effected, the District Judge has also observed that all through out the partition suit was being prosecuted and suit for specific performance of contract filed by the respondent no.1 was defended by the present respondent no.4, brother of the present petitioners, and thus the interest of the petitioners was represented by respondent no.4, who participated in the final decree proceedings as well. Taking a realistic view of the matter and being conscious of the fact that the relations of the present petitioners and the respondent nos.2 to 4 was cordial, the court has declined to believe the case of the petitioners, that they were not aware of the final decree proceedings, as they were not duly served.

6. Perused the order passed by 3rd Addl. District Judge, Nashik. The same takes a correct view of the

legal and factual position. No interference with the order is warranted. The writ petition is thus summarily dismissed. Needless to mention that the interim order stands vacated.

7. The learned counsel for the petitioner at this stage seeks stay of this order. Prayer is rejected.

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